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CITATIONS

In the Supreme Court of the United States

OCTOBER TERM, 1945

No. 1102

ROBERT GOULD AND DOWLING BROS. DISTILLING COMPANY, A KENTUCKY CORPORATION, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the circuit court of appeals (R. 936–948) is reported at 153 F. 2d 353.

JURISDICTION

The judgment of the circuit court of appeals was entered February 8, 1946 (R. 935), and petitions for rehearing were denied March 11, 1946 (R. 1011).[1] The petition for a writ of certiorari

[1] The petitions for rehearing were apparently denied before the judges who heard the appeal received a supplemental petition (see R. 1011). On April 13, 1946, after the petition for a writ of certiorari had been filed in this Court, the circuit court of appeals denied the supplemental petition. We are informed by counsel for petitioners that a copy of this order has been sent to the Court.

was filed April 12, 1946. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.[2]

QUESTIONS PRESENTED

1. Whether the counts of an indictment charging sales and deliveries of liquor at above ceiling prices, each based on a separate invoice from buyer to seller, charged separate offenses.

2. Whether the petitioner corporation was properly found to be criminally liable for sales effected by its principal stockholder who was in active control of the corporation and in complete charge of sales.

3. Whether evidence of sales to persons not charged in the indictment in a manner similar to that proved as to those charged in the indictment was properly admitted in rebuttal as bearing on the credibility of petitioner Robert Gould after he had denied making such sales.

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[2] The petition was filed within 30 days, exclusive of Sundays and holidays, from the date of the order of the circuit court of appeals denying rehearing, as allowed by Rules XI and XIII of the Criminal Appeals Rules promulgated by this Court May 7, 1934, but more than 30 calendar days after the order, as allowed by Rules 37 (b) (2) and 45 (a) of the new Rules of Criminal Procedure, effective March 21, 1946. Since the petition seeks review of a judgment entered prior to the effective date of the new rules, we do not contest its timeliness. See Rule 59 of the Rules of Criminal Procedure, providing that, "so far as just and practicable," the rules govern all criminal proceedings which were pending on their effective date.

STATUTE INVOLVED

The Emergency Price Control Act of 1942, 56 Stat. 23, as amended, 50 U. S. C. App., Supp. IV, 901 *et seq.*, provides in pertinent part:

> SEC. 2. (a) Whenever in the judgment of the Price Administrator * * * the price or prices of a commodity or commodities have risen or threaten to rise to an extent or in a manner inconsistent with the purposes of this Act, he may by regulation or order establish such maximum price or maximum prices as in his judgment will be generally fair and equitable and will effectuate the purposes of this Act. * * *
>
> SEC. 4. (a) It shall be unlawful * * * for any person to sell or deliver any commodity, * * * in violation of any regulation or order under section 2 * * *.
>
> SEC. 205. * * * (b) Any person who willfully violates any provision of section 4 of this Act * * * shall, upon conviction thereof, be subject to a fine of not more than $5,000, or to imprisonment for not more than two years in the case of a violation of section 4 (c) and for not more than one year in all other cases, or to both such fine and imprisonment. * * *.

STATEMENT

An indictment in 48 counts was returned against petitioners in the United States District Court for the Eastern District of Kentucky, each count charging the sale and delivery of a specified

quantity of liquor on a specified date between June 26 and December 2, 1943, at prices in excess of the maxima fixed by O. P. A. regulations (R. 2–137). Counts 1 to 21, inclusive, were based on sales to Josselson Bros. Inc. (R. 2–59), and counts 22 to 48 on sales to E. J. Baumer, doing business as B. & B. Liquor Wholesalers (R. 59–137).

Alex Josselson and E. J. Baumer were witnesses for the Government (R. 202, 374). Each of them testified that petitioner Robert Gould agreed to sell him liquor at fixed prices above ceiling, the amount of the excess charge varying according to the grade and quantity of the liquor (R. 202–205, 208, 269, 376–378). As each of these witnesses was on the stand, the invoice upon which each count of the indictment was based was introduced in evidence, and the witness testified that he had received the liquor covered by the invoice, had paid the invoice (ceiling) price by check to the Dowling Company, and had paid an additional specified amount in cash to Robert Gould personally (R. 208–244, 379–399). In all, Josselson paid approximately $280,000 above ceiling and Baumer over $200,000.[3]

[3] Baumer was directly corroborated by one of his salesmen, who testified that on some occasions he delivered cash to Robert Gould (R. 509, 511–512). Josselson was corroborated to the extent that his bookkeeper testified that Josselson directed him to keep packages of currency in the safety deposit vault and to take out the money before Josselson's trips to Cincinnati (cf. R. 248 with R. 326–327, 343), where peti-

Robert Gould was chairman of the board of directors and majority stockholder of the Dowling Company (R. 372, 649–650). The only other substantial stockholder was his brother Alvin (R. 372–373, 653), whom Robert characterized as a partner (R. 569), and who, during the period covered by the indictment, was on active duty in the United States Coast Guard (R. 761). With Alvin Gould's knowledge and consent, Robert Gould was directing head of the company (R. 761–762). Robert was in complete charge of sales (R. 354, 651).

In submitting the case to the jury, the judge charged that "the corporation here can be guilty only if you believe that there were violations of these maximum ceiling prices by its officers and agents and stockholders with the consent of the corporation. A corporation can only give its consent through its stockholders, officers and agents" (R. 912). He then stated that there was no dispute that Robert and Alvin Gould owned all but 20 shares of the stock of the corporation, and further charged the jury that "if you believe that this corporation, acting through its agents, managing agents, officers and stockholders, with their consent, violated this law as charged in this in-

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tioner Gould maintained his office (R. 352, 649–651). Baumer also testified that he paid Gould with bills of large denominations (R. 378) and there was testimony by various bank tellers that on a number of occasions Gould exchanged large bills for smaller ones (R. 529–530, 533–534, 536–537).

dictment, and if you believe that as I shall instruct you beyond a reasonable doubt, then, the corporation is liable" (R. 912).

The jury returned a verdict of guilty on all counts against both Robert Gould and the corporation (R. 924). Gould was sentenced to imprisonment for a total of six years, one year on each count of the indictment, the first six sentences to run consecutively and the others to run concurrently with the first six and with each other. He was also fined $5,000 on each count, making a total fine of $240,000. The corporation was also fined $240,000, $5,000 on each count. (R. 925.) On appeal, the judgments were affirmed (R. 935).

ARGUMENT

Petitioners contend (Pet. 2, 3, 6, 9, 10–15) that a number of counts of the indictment are based on the same transaction and do not charge separate offenses. The point was first raised by a supplement to the petitions for rehearing filed in the circuit court of appeals on March 7, 1946 (R. 995–1008), more than a week after the original petitions for rehearing had been filed (R. 951–992). The circuit court of appeals denied the petitions for rehearing on March 11, 1942 (R. 1011), apparently before the supplement to the petitions had been received by the judges who heard the appeal (see R. 1011). On April 13, 1946, after the petition for a writ of certiorari

had been filed in this Court, the circuit court of appeals entered a *per curiam* order denying the supplement to the petition, in which it pointed out that even if petitioners' contention in this respect were sound, there would nevertheless be a sufficient number of valid counts to support the term of imprisonment imposed against Robert Gould. It declined to express any view on the belated challenge to the validity of the fines, stating that a defendant may move in the convicting court for correction of an invalid sentence.

We assume that, as petitioners argue (Pet. 14–15), the question is one which may be raised at this point, despite the tardiness of the objection below. The contention is, however, clearly without substance. Each count of the indictment was based on a separate invoice from the Dowling company to the purchaser, and when a particular invoice included different quantities and brands of liquor the transaction was nevertheless charged as one offense (see count 4, R. 10–12; count 5, R. 12–15; count 6, R. 15–18; count 10, R. 26–29; count 36, R. 99–102). All the invoices except those forming the basis of the first two counts bear different dates, showing clearly that they represented separate deliveries of liquor. Since delivery is itself an offense under the Emergency Price Control Act (see Section 4 (a), *supra*, p. 3; *Schreffler* v. *Bowles*, 153 F. 2d 1 (C. C. A. 10)), counts 3 to 48, inclusive, on their face charge separate offenses which were established as such by

the evidence consisting of the separate invoices. Petitioners' contention that certain groups of these counts are based on single transactions is predicated upon the fact that such counts specify that the respective agreements to sell were made on the same date (Pet. 11–12). However, each count specified the date of the invoice as the date of the offense charged therein. Nor does the fact that the purchaser paid for two separate invoices by one check (R. 386–390) establish, as petitioners claim (Pet. 12), that such invoices represent one transaction.

The separate invoices upon which counts 1 and 2 were based bear the same date, but one was for whiskey and the other for rum (R. 2–7). Even as to these counts, the indications are that the invoices represented separate shipments since, in another instance, rum and whiskey were covered by one invoice (count 4, R. 10–12). In any event, rum and whiskey are two separate items subject to two different ceiling prices which had to be separately calculated (see R. 456). Hence, even assuming that delivery was made at the same time under both invoices, we think it is clear that the sale of each of these separate articles constitutes a separate offense.

2. On behalf of the corporation it is contended (Pet. 2, 7, 15–20) that the indictment does not allege, and the evidence does not establish, facts upon which to predicate corporate responsibility.

The indictment alleged in each count that the corporation and Robert Gould, who was "a principal stockholder and director," unlawfully sold and delivered and aided and abetted each other in so selling and delivering liquor at above ceiling prices. Manifestly, therefore, the indictment directly alleged illegal corporate action.

The proof established that the only substantial stockholders of the corporation were Robert Gould and his brother Alvin, and that Robert, with Alvin's knowledge and consent, was in active control of the corporation and in complete charge of sales during Alvin's absence on military duty (see *supra,* p. 5). Dowling, the president of the corporation, testified that he was in charge of the distilling process and had no authority to make sales (R. 349–354). The only person who could act for the corporation in making the sales in question was, therefore, Robert Gould. The liquor sold was owned by the corporation and the sales were invoiced in its name. Since it is well established that a corporation is criminally responsible for the acts of its agent committed in the scope of the agent's authority,[4] we think it is clear that the corporation was properly held liable for the sale of corporate owned liquor sold by

[4] *New York Central Railroad* v. *United States*, 212 U. S. 481; *C. I. T. Corporation* v. *United States*, 150 F. 2d 85, 89–90 (C. C. A. 9); *Egan* v. *United States*, 137 F. 2d 369, 379 (C. C. A. 8), certiorari denied, 320 U. S. 788; *Mininsohn* v. *United States*, 101 F. 2d 477–478 (C. C. A. 3).

the only agent of the corporation who could make sales.

In instructing the jury as to corporate responsibility, the judge laid down a stricter test than that set forth in the cases cited (*supra,* fn. 4); he charged that there must have been consent by the corporation (*supra,* p. 5). He then summarized the undisputed facts from which such consent might be found. Since the charge in this respect was more favorable to the petitioning corporation than was required, the objection to the charge (Pet. 20) is without merit.

Under the facts of this case, Robert Gould, who made the sales, was also the person who, with the knowledge and consent of all stockholders, was in active control of the corporation as a whole. In practical effect, he was the only person who was in a position to give consent on behalf of the corporation. The jury was thus justified in finding the corporation liable under the judge's charge on the basis of its consent to the acts in question. There is no proof that payment to Gould, the responsible officer of the corporation, was not payment to the corporation. But, in any event, benefit is not the "touchstone of corporate criminal liability; benefit, at best, is an evidential, not an operative, fact." *Old Monastery Company* v. *United States,* 147 F. 2d 905, 908 (C. C. A. 4), certiorari denied, October 8, 1945, No. 229 this Term.

3. When Robert Gould took the stand in his own behalf, he testified that the Dowling company had made sales to Josselson and Baumer at the invoice prices and that he had not received, directly or indirectly, any payments above those prices (R. 612). On cross-examination, he was asked whether he had not, during the period covered by the indictment, received cash premiums above ceiling prices from persons not named in the indictment, and he denied receiving such payments (R. 661–667, 676–677). Petitioners' objections to this line of cross-examination were overruled (R. 664, 665, 676, 677). In rebuttal, the Government called as witnesses the persons about whom Gould had been questioned and, over objections by defense counsel (R. 868–885), these witnesses were allowed to testify that they had made cash payments in excess of ceiling prices to Gould (R. 885–886, 889–891, 892–893, 894–895).[5] In each instance the judge instructed the jury that the evidence should be considered, if at all, only as bearing on the credibility of Robert Gould (R. 888, 891, 893, 895–896).

Petitioners argue (Pet. 3, 7, 20, 23) that the admission of this evidence in rebuttal constituted reversible error on the ground that it was offered

[5] During the course of the discussion of petitioners' objections, it appeared that the trial judge first thought that Gould had testified on direct that he had never made any sales above ceiling (R. 872), but before the judge made his final ruling, he admitted that Gould had not made such a general statement (R. 884).

in contradiction of a collateral issue. However, as petitioners' counsel himself admitted during the course of the argument on the admissibility of such testimony (R. 869, 873, 879, 881), the evidence could properly have been offered in the Government's case in chief as bearing on the willfulness of petitioners' conduct and the scheme by which they operated. *Morris* v. *United States*, 123 F. 2d 957 (C. C. A. 5); *United Cigar Whelan Stores Corporation* v. *United States*, 113 F. 2d 340, 347 (C. C. A. 9); see *Glasser* v. *United States*, 315 U. S. 60, 81. The evidence was therefore not collateral as that term is used in defining the limits by which a cross-examiner is bound by the negative answers given by a witness. The rule is that facts which could have been independently offered for another purpose may be offered in contradiction of a witness. 3 Wigmore, *Evidence*, 3d ed., sec. 1003. It was, therefore, proper for the Government to cross-examine Gould as to these matters, both on the issue of his intent, and as affecting his credibility,[6] and to offer evidence to rebut his negative answers. *Strom* v. *United States*, 12 F. 2d 233, 234 (C. C. A. 6), certiorari denied, 271 U. S. 683; see *Ewing* v. *United States*, 135 F. 2d 633, 640–641 (App. D. C.), certiorari denied, 318 U. S. 776.

[6] *Powers* v. *United States*, 223 U. S. 303, 315, 316; *United States* v. *Skidmore*, 123 F. 2d 604 (C. C. A. 7), certiorari denied, 315 U. S. 800; *United States* v. *Harrison*, 121 F. 2d 930, 934 (C. C. A. 3), certiorari denied, 314 U. S. 661.

In essence, petitioners' contention amounts to no more than that evidence which could have been admitted in chief was allowed in rebuttal. It is well established that this does not constitute grounds for reversal. *Goldsby* v. *United States,* 160 U. S. 70, 74; *United States* v. *Montgomery,* 126 F. 2d 151 (C. C. A. 3), certiorari denied, 316 U. S. 681; *Cornes* v. *United States,* 119 F. 2d 127, 130 (C. C. A. 9); *Hoffman* v. *United States,* 68 F. 2d 101, 103 (C. C. A. 10). Petitioners in particular have no cause for complaint, since the evidence as finally admitted was given more limited application than it would have had if offered in chief.

CONCLUSION

The decision below is correct and the case presents no conflict of decisions or question of general importance. It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

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